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## UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

## FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 02-30326
	)
Plaintiff-Appellee,	) U.S.D.C. No. CR-02-00011-SEH
	) District of Montana, Great Falls
v.	)
	)
ALFREDO ARNOLD AMELINE,	) MR. AMELINE'S OPPOSITION TO
	) APPELLEE UNITED STATES' MOTION
Defendant-Appellant.	) TO STAY ALL CASES INVOLVING
	) BOOKER

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## I.

INTRODUCTION

The government's request that this Court defer all pending appeals presenting claims under United States v. Booker, 125 S. Ct. 738 (2005), should be rejected. As a threshold matter, Mr. Ameline assumes that only an en banc panel could grant such relief. Certainly the government provides no explanation of the source of any authority that the three judge Ameline panel would have to enter orders affecting cases not before it.

But even if there is such authority, or if an en banc panel is convened, this Court should not grant the requested relief because the government has not shown that it has an adequate chance of prevailing on the merits. Of the seven Circuits to consider the issue, five have held that some sort of remand is proper; only two have held otherwise. And the most recent decision allowing a remand, United States v. Paladino, 2005 WL 43540 (7th Cir. Feb. 25, 2005), severely criticized United States v. Rodriguez, 2005 WL 272952 (11th Cir. Feb. 4, 2005), the authority relied upon by the

government. See Paladino, 2005 WL 43540 at \*11 ("we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence"). Moreover, the balancing of the relative harms strongly favors criminal defendants: a stay will cause some defendants to lose any chance at relief because their sentences will expire. See United States v. Castro, 382 F.3d 927, 929 (9th Cir. 2004) (remanding where the legitimately imposed portion of the defendant's sentence would expire if the case was stayed).

The government also asks that this Court expedite consideration of its petition for rehearing en banc and, if the petition is granted, that it also expedite oral argument. Mr. Ameline takes no position on these requests. He, too, wishes a prompt resolution, preferably by denial of the government's petition.

## II.

### THIS COURT SHOULD DENY THE MOTION FOR A STAY.

In considering whether to grant a stay, this Court considers "the likelihood of success on the merits and the relative harms to the parties." Beardslee v. Woodford, 395 F.3d 1064, 1068 (9th Cir. 2005) (per curiam) (citations omitted). Accord United States v. Claiborne, 790 F.2d 1355, 1356 (9th Cir. 1986); In re Letters Rogatory, 539 F.2d 1216, 1220 (9th Cir. 1976). Neither of these considerations supports the government's motion for a stay.

The government has not shown a likelihood of success on the merits. Five of the seven Circuits to have addressed the issue of application of Booker on plain error have determined that some sort of remand is required. See Paladino, 2005 WL 43540 (limited remand)<sup>1</sup>; United States v. Ameline, 2005 WL 350811 (9th Cir. Feb. 10, 2005) (full remand); United States v. Milan, 2005 WL 309934 (6th Cir. Feb. 10, 2005) (full remand); United States v. Crosby, 2005 WL 240916, \*8 (2d Cir. Feb. 2, 2005) (limited remand); United States v. Hughes, 396 F.3d 374 (4th Cir. 2005) (full remand). See also United States v. Barnett, 2005 WL 357015 (6th Cir. Feb. 16, 2005) (presuming prejudice on plain error in cases not involving constitutional error). Moreover, the Supreme Court remanded both Mr. Booker and Mr. Fanfan for resentencing. See Booker, 125 S. Ct. at 769.

For its part, the government cites Rodriguez and United States v. Antonakopoulos, 2005 WL 407365 (1st Cir. Feb. 22, 2005), cases which require the defendant to demonstrate a reasonable likelihood that the sentence would be lower in order to secure a remand. This approach conditions the vindication of important constitutional rights on the possibility that a district court who lacked the discretion granted by Booker nonetheless left some clues as to how he or she would have exercised that unanticipated discretion. The

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<sup>1</sup> There were two dissents from the failure to review the Paladino cases en banc. See Paladino, 2005 WL 43540 at \*11-15. The two dissents advocated for an approach similar to Ameline, Milan and Hughes, not the position urged by the government.

Seventh Circuit rightly criticizes this approach as one likely to result in the affirmance of a large number of illegal sentences. See Paladino, 2005 WL 43540 at \*11.

The government frets that "many defendants will receive new sentencing hearings - and potentially new sentences - to which they have no legal entitlement." Mot. at 2. It is hard to understand what complaint the government has with defendants who actually get "new sentences." Even Rodriguez holds that a defendant who can show a "reasonable likelihood" that the sentence would be different is entitled to a remand.<sup>2</sup> The government's concern about "new sentences" suggests that the government's real agenda is not efficiency, but the avoidance of "new sentences" by frustrating the implementation of Booker's constitutional mandate.

If the government has any legitimate arguments at all, and Mr. Ameline believes that it does not, they would go to the resources expended on defendants who get resentenced and, once again, get the "old sentence." The argument would be that it is desirable to allow defendants who would have gotten lower "new sentences" -- but cannot prove it in advance -- to sit in jail unnecessarily because we can save some time on sentencing hearings for those defendants who would not get a new sentence. This is not an attractive argument - and it certainly is not attractive to those who will

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<sup>2</sup> Presumably, even defendants who meet the stringent Rodriguez test would have their case stayed if the government's motion was granted. See United States v. Shelton, 2005 WL 435120, \*6-7 (11th Cir. Feb. 25, 2005) (remanding for resentencing under Rodriguez).

remain in prison to save judges and lawyers some time - because the deprivation of freedom is a terrible sanction, and one that ought to be imposed with care and consideration, not to mention respect for fundamental constitutional guarantees.

Mr. Ameline does agree that this Court should seek "to ensure the evenhanded treatment of similarly situated defendants and minimize the risk of inequity that could otherwise result from disparate treatment." Mot. at 2. But deferring resolution of this Court's cases does not further that goal. First, this Court is already remanding cases. See, e.g., United States v. Moreno-Hernandez, \_\_ F.3d \_\_, 2005 WL 387608, \*7 (9th Cir. Feb. 18, 2005) (remanding without any showing of a Sixth Amendment violation because "[w]e cannot know whether the district court would have applied this enhancement under a system in which the Guidelines were only advisory."); United States v. Ruiz-Alonso, \_\_ F.3d \_\_, 2005 WL 326839, \*4 (Feb. 11, 2005) (remanding because "[w]e cannot say that the district court judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of downward departures.").<sup>3</sup> Second, defendants who are serving shorter sentences will lose what little chance they have at gaining relief as their sentences expire. Castro remanded to avoid this injustice. See 382 F.3d at 929. Third, the strong majority of

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<sup>3</sup> It has also remanded a number of cases in a number of unpublished decisions.

Circuits that are approving remands of varying scope demonstrates that a stay will result in disparate treatment, not equity.

Finally, the government approvingly points out that some cases were (informally) held pending resolution of United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc). It even suggests that "a similar approach is warranted here." Mot. at 2. If so, then this Court should deny the motion. There is nothing to stop panels from informally adopting the government's proposed policy in any given case. This Court need not order what a panel can do already. The informal stay procedure has the potential to avoid extinguishing the rights of defendants whose sentences are at risk of expiring before the issues presented in the instant case are resolved. In those cases where it is appropriate, individual prosecutors are perfectly free to argue that a stay is a proper course of action, and individual panels will have no trouble evaluating such requests.

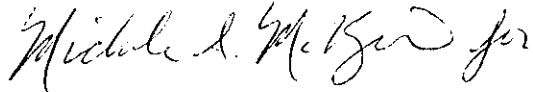
Mr. Ameline takes no position on the government's request that the Court expedite the en banc process. Briefing will be complete by the end of the week, and he expects that the Court will act promptly. Mr. Ameline is serving a sentence imposed after a grievously flawed sentencing hearing in which his Sixth Amendment rights were violated. Because he looks forward to a constitutional sentencing hearing, he has no interest in delay.

III.

CONCLUSION

The motion to stay should be denied. Mr. Ameline takes no position on the motion to expedite.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steven F. Hubachek", written in dark ink.

Dated: February 28, 2005

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v.	)
	)
ALFRED ARNOLD AMELINE,	) PROOF OF SERVICE
	)
Defendant-Appellant.	)
	)

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I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the County of San Diego, State of California, not a party in the within action, and that my business address is U.S. Courthouse, 450 Golden Gate Ave., San Francisco, California, 94102; and

2. That I mailed the within MR. AMELINE'S OPPOSITION TO APPELLEE UNITED STATES' MOTION TO STAY ALL CASES INVOLVING BOOKER by Federal Express, an original and fifty (50) copies thereof to the United States Court of Appeals for the Ninth Circuit, 95 7th Street, San Francisco, CA 94103;

3. That I served the within Motion to counsel for Plaintiff-Appellee by mailing a copy to:

Michael A. Rotker, Attorney  
United States Department of Justice  
Criminal Division, Appellate Section  
950 Pennsylvania Ave., N.W. Suite 1264  
Washington, DC 20530

4. That I served a copy to defendant-appellant by mailing a copy to:

Alfred Arnold Ameline  
Reg. No. 07284-046  
Florence Camp  
P.O. Box 5000  
Florence, CO 81226

I certify that the foregoing is true and correct. Executed on February 28, 2005, at San Diego, California.

  
\_\_\_\_\_  
ANGELICA HERNANDEZ